SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 36

UNITED STATES OF AMERICA,

Appellant,

vs.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

ALFRED MCCORMACK,
Counsel for Appellees.

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GERALD SCHOENFELD,
AARON LIPPER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 647

UNITED STATES OF AMERICA,

Appellant,

vs.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN, UNITED BOOKING OFFICE, INCORPORATED, SELECT THEATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CIVIL ACTION NO. 56-72

Appellee moves the Supreme Court of the United States, pursuant to Rule 7, paragraph 4, and Rule 12, paragraph 3, of its Revised Rules, that the final judgment of the District Court be affirmed.

The ground of such motion is that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Opinion Below

The opinion of the District Court for the Southern District of New York (Judge Knox), which has not yet been reported, is quoted in full under the next heading.

Proceedings Below

The complaint was filed February 21, 1950. It charges violations of Sections 1 and 2 of the Sherman Act in one or more of the three branches into which the Government has divided the "legitimate" theatrical business, (1) "production", *i.e.*, putting together dramatic and musical attractions for the legitimate theatre; (2) "booking", *i.e.*, arranging for legitimate theatres to obtain attractions to be played in them, and scheduling the playing of such attractions in "try-out" towns, in New York and on tours "on the road"; and (3) "presentation", *i.e.*, giving performances of the play in the selected theatres.

The answers of the appellees were filed on May 31, 1950. At the time of the decision in *Toolson* v. *New York Yankees*, 21 L.W. 4014, on November 9, 1953, numerous pre-trial proceedings had been had and others were in progress.

On November 24, 1953, in reliance on the *Toolson* decision, appellees moved to dismiss the complaint on the grounds (a) that the Court did not have jurisdiction of the subject matter of the action and (b) that the complaint did not state a claim upon which relief could be granted.

The District Court (Judge Knox) granted the motion, and final judgment was entered on December 30, 1953. The opinion of Judge Knox reads as follows:

> "In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, and *Toolson* v. *New York Yankees*

et al., decided by the Supreme Court on November 9, 1953.

"Upon the authority of these adjudications the complaint in the above entitled action will be dismissed."

For brevity we shall refer to *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U.S. 200, as the *Old Baseball* case.

Argument

THE DECISION OF THIS CASE IS GOVERNED BY THE *OLD BASEBALL* CASE AND THE *TOOLSON* CASE.

The legitimate theatrical business is not distinguishable from organized baseball in its interstate commerce aspects. In both businesses, performances by living players are given at particular places for the entertainment of the public. Tickets of admission are offered for sale, and those who have tickets are admitted. Uniformly in the baseball business, and often in the theatrical business, the players must move from State to State because the places where the performances are given are in different States. The performances are "booked" in the same sense in both businesses. That is, arrangements are made for the places of entertainment to be available on particular days for particular performances. The end of the whole business is the performance—a purely local show, an intra-state matter.

The jurisdictional allegations of interstate commerce in the complaint in the present action are summarized in paragraph 49 as follows:

> "In the course of producing, booking and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals, the transportation of said personnel and property to various cities throughout the United States, the making and performing of

contracts under which attractions are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines."

As the records and opinions in the *Old Baseball Club* case and the *Toolson* case clearly show, every word of the above-quoted paragraph of the complaint applies equally well to organized baseball as to the legitimate theatre. There is the same kind of "stream of commerce between the States" in baseball as in the theatre business, the same kind of "assemblage of personnel and property for rehearsal" (winter practice in the South) and the same kind of "transportation of said personnel and property to various cities throughout the United States"; and it is for the same purpose—"the performing of contracts under which attractions (baseball teams) are routed and presented in various States", and finally there is in baseball, as in the theatre business, "the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines."

In applying the doctrine of *stare decisis* in the *Toolson* case, this Court stated that it was following the *Old Baseball* case "so far as that decision determines that Congress had no intention of including the business of baseball within the federal anti-trust laws". That determination was made in the *Old Baseball* case, not upon the basis of any finding as to the subjective intent of Congress, but upon the basis of a principle of law to the effect that the business of giving local performances or exhibitions by living persons for the entertainment of the public, from time to time at localities in different States, is not interstate trade or commerce in spite of the necessary movements of persons and paraphernalia across State lines.

That principle in turn rested upon two subordinate principles, which were stated in substance as follows:

> (a) Such a business is not *trade or commerce* ("personal effort not related to production is not the subject of commerce", see 200 U.S. at 209); and
>
> (b) It is not interstate ("exhibitions of baseball . . . are purely state affairs"; and "That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place" (200 U.S. at 208-09).

If *stare decisis* relates to principles of law, and if there is not to be one law for organized baseball and a different law for other businesses, though they be indistinguishable from baseball in their interstate aspects, then the *Toolson* case stands for the proposition that a business—whether baseball or something else—that consists of giving local performances for the entertainment of the public is not interstate trade or commerce in spite of the movements of persons and paraphernalia across State lines that are made necessary by the fact that the local entertainment is offered from time to time at places in different States; and it also stands for the proposition that such a business either is not *trade or commerce* at all or, if trade or commerce, is not *interstate* in character.

Whether such a business is or is not trade or commerce and, if it is, whether the trade or commerce is interstate in character, were the "underlying issues" which, in the *Toolson* case, this Court said it was not re-examining.

Our position is that it has now been established, by application of the doctrine of *stare decisis* in the *Toolson* case, that as a matter of law the giving of local performances for the entertainment of the public, from time to time at places in different States, is not interstate trade or commerce within the meaning of those words in the Sherman Act.

Review of the Authorities

The decisions relating to baseball and those relating to the theatrical business have been inextricably interwoven since the *Old Baseball* case was presented to this Court. In earlier cases involving the theatrical industry, *People* v. *Klaw*, 55 Misc. 72 (N.Y. 1907) and *Metropolitan Opera Co.* v. *Hammerstein*, 162 App. Div. 691 (N.Y. 1914), it had been decided that the vaudeville and operatic branches of the theatrical businesses were not interstate commerce.

Then came the decision of Judge Learned Hand in *H. B. Marienelli* v. *United Booking Offices of America*, 227 Fed. 165, a civil anti-trust suit between private parties, involving the vaudeville branch of the theatrical business. Marienelli was a booking agent for vaudeville acts. The defendants were the two large vaudeville circuits (Keith and Orpheum) and the booking agencies which they controlled. The complaint alleged in substance that the defendants had combined and conspired to monopolize all vaudeville booking and to exclude plaintiff from it, and that they had blacklisted him and destroyed his business. Judge Hand held that the complaint was proof against demurrer. He reasoned that interstate commerce was involved in the business, in that vaudeville performers and their paraphernalia, stage scenery and advertising moved from State to State in fulfillment of the booking contracts; that the effect of the alleged conspiracy on that interstate commerce was "direct" rather than "indirect"; and that therefore the Sherman Act was applicable.

Prior to the decision of the *Marienelli* case, the Attorney General had been called upon (in 1911) to rule on whether the federal anti-trust laws applied to the theatrical business; and after the *Marienelli* decision the Attorney General was called upon twice to rule on the same question—in 1917 and

in 1920. All the rulings were to the effect that the anti-trust laws did not apply to the theatrical business.

Only the last of the three rulings has been available to us, and that has been available only because, the Department of Justice having declined to produce it upon our request, on the ground that it was "confidential", we made a search of the records and briefs in the *Old Baseball* case and the later cases and found that in one of the briefs the 1920 opinion had been quoted in full.[1] The Government then admitted the authenticity of the ruling, which refers to the two earlier rulings and reads as follows:

April 2nd, 1920.

Hon. Victor Murdock,
Chairman, Federal Trade Commission,
Washington, D. C.

Sir:

Receipt is acknowledged of your favor of March 27th transmitting your records in the case of the *Federal Trade Commission* v. *The Vaudeville Managers' Protective Association, et al.*[2]

This subject has previously been considered by the Department, and my predecessors on January 28, 1911, and again on March 24, 1917, took the view that the business of presenting and executing theatrical entertainments is not commerce within the constitutional sense, and that, therefore, such a combination as that involved in this case does not fall within the Acts of Congress prohibiting combinations in restraint of interstate commerce.

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[1] Brief for Orpheum Circuit, Inc. (at pp. 25-26) in *Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. 2d 341.

[2] The docket of the Federal Trade Commission in the above-entitled matter (No. 128-1918) discloses that the complaint was filed in 1918; that in March 1920 the record of the proceeding was referred to the Department of Justice; and that, following receipt of the above-quoted letter of the Assistant to the Attorney General, the complaint was dismissed by the Commission.

I see no reason to depart from the views of my predecessors, and, therefore, I am returning herewith your records.

Respectfully,
(Signed) C. B. Ames,
Assistant to the Attorney General.

Enclosure 16972.

Thus when the *Old Baseball* case came before this Court for decision, the Department of Justice had twice declined to follow the reasoning of the *Marienelli* case, and three times—under three different Attorneys General—had arrived at a contrary conclusion on the question of interstate commerce in respect of the theatrical business.

In arguing the *Old Baseball* case before this Court, counsel for the baseball interests, Mr. George Wharton Pepper, cited as one of his authorities the rulings of the Department of Justice applicable to the theatrical business.

In the *Old Baseball* case the District Court had followed the *Marienelli* case, and had directed the jury to find for the plaintiff on the interstate commerce issue.[3] The Court of Appeals reversed (269 Fed. 681); and this Court affirmed the Court of Appeals.

The *Marienelli* case was clearly overruled by the *Old Baseball* case, which had been cited in this Court by the plaintiff as an authority that was "particularly" applicable (see 200 U.S. at 205).

The next case in chronological order is the *Hart-Keith* litigation, which came to this Court in 1923, *Hart* v. *Keith Exchange*, 262 U.S. 271. Hart, like Marienelli, was a booking agent. The principal defendants were the same as in the *Marienelli* case, except that in the interval between the two cases the booking offices of the two major vaudeville

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[3] See opinion of Court of Appeals for the District of Columbia, 269 Fed. 681, 684.

circuits (Keith and Orpheum) appear to have been combined into one.

The complaint alleged that the defendants owned or controlled and operated 103 vaudeville theatres in 78 cities in the United States and Canada, and by various means had monopolized the business of operating vaudeville theatres and the business of booking acts into vaudeville theatres (their own and those of others), excluding plaintiff and ruining his business. The complaint was long and detailed (55 pages in the CCA record); and from the excerpts which we annex as Appendix A hereto it may be seen that the draftsmen bent every effort to make a showing of the interstate aspects of the vaudeville branch of the theatrical business.

When the case came on for trial, the District Court (Judge Mack) dismissed the complaint without taking testimony. Citing the *Old Baseball* case, he held that the alleged conspiracy was not in interstate commerce, that the complaint did not state a case under the Sherman or Clayton Act, and that therefore the Court was without jurisdiction. In announcing his ruling, Judge Mack disposed of the *Marienelli* case with the following remarks:[4]

> "If the criterion laid down by Judge Hand in his decision in the *Marienelli* case had been adopted by the Supreme Court, this case would be clear, because it falls clearly within the *Marienelli* case. In my judgment, however, the Supreme Court in the baseball case has not adopted that criterion, but it adopted one which practically is that the dominant object of the parties in respect to the matters complained of must affect or be interstate commerce; and in my judgment, that is so neither in the case of the defendants nor in the case of the plaintiff."

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[4] Printed in the brief for Orpheum Circuit, Inc., et al., before the Court of Appeals (12 F. 2d 341). In the quotation we have corrected a misspeling of "Marienelli".

On appeal to this Court from Judge Mack's decision, the appellees (defendants) relied, of course, on the *Old Baseball* case, contending that in the theatrical business, "the dominant object of all the arrangements was the performance of the actors, all the transportation being incidental to that." The countervailing argument of the plaintiff, as summarized in the opinion of Mr. Justice Holmes, was "that in the transportation of vaudeville acts, the apparatus sometimes is more important than the performers, and that the defendants' conduct is within the statute *to that extent at least*" (262 U.S. at 273; emphasis ours).

This Court decided, in substance, that it could not say positively, from an examination of Hart's 55-page complaint, there was not some aspect of the vaudeville business that involved interstate commerce within the meaning of the Sherman Act. Mr. Justice Holmes in his opinion referred to the rule that "a claim that if well founded is within the jurisdiction of the Court . . . is within that jurisdiction whether well founded or not", and said (at p. 274; emphasis ours):

> "It is enough that we are not prepared to say that *nothing can be extracted* from this bill that falls under the act of Congress, or *at least* that the claim is wholly frivolous."

On remand to the District Court the case was tried before Judge A. N. Hand. After hearing the plaintiff's testimony, he granted defendants' motion to dismiss. In doing so, he said of this Court's decision in *Hart* v. *Keith Exchange* (Record in 12 F.2d 341, fols. 3222-23):

> "Mr. Justice Holmes writing in the Supreme Court in this case (Hart vs. Keith) decided nothing more than that upon the complaint with its extensive allegations relating to interstate commerce the trial court ought to have gone into the facts, and not have dismissed on the pleadings."

He then went on to decide that "the interstate commerce shown is incidental to the primary thing, that of entertainment" and that, therefore, the dismissal of the bill was required by the *Old Baseball* case.

The Court of Appeals unanimously affirmed. In its opinion it dealt with the argument, which Mr. Justice Holmes had summarized, that "in the transportation of vaudeville acts, the apparatus" might sometimes be "more important than the performers". The Court of Appeals dealt with the statistics of acts alleged to be in that category, and concluded that they were so small a portion of the sum total of vaudeville acts as to be "incidental"; and it then went on to conclude that the transportation of animals, costumes and paraphernalia were only incidental to the local performances, saying (at p. 344):

> "It is sufficient to liken such property to that of the baseball players' masks, balls, and bats used by them, and which were considered incidental in the Federal Baseball Case."

This Court denied *certiorari*, *Hart* v. *B. F. Keith Vaudeville Exchange*, 273 U.S. 703. We do not draw the prohibited inference from the denial of *certiorari*, but we point to a necessary effect of such denial, which is relevant to the application of the *Toolson* doctrine to this case—that by denying *certiorari* this Court allowed the decision of the Circuit Court of Appeals to stand, and the theatrical industry to remain outside of the scope of the Sherman Act—at least in the Circuit in which the major activities of the theatrical business are conducted.

Next in the chronology of cases is *Ring* v. *Spina*, 148 F.2d 267, decided by the Court of Appeals for the Second Circuit in 1945. The case involved the validity under the antitrust laws of the so-called Minimum Basic Agreement of the Dramatists' Guild of the Authors League of America,

The District Court had denied injunctive relief pending trial, holding that the theatrical industry was not within the Sherman Act. A two-judge Court of Appeals, consisting of Circuit Judge Clark and Judge Evans, visiting from the Seventh Circuit, reversed, holding that plaintiff had made out a *prima facie* case for relief.

Judge Clark wrote the opinion. He construed the *Hart* v. *Keith* cases and the *Old Baseball* case as holding only "that contracts for the personal services for exhibition purposes as vaudeville and baseball artists were not in interstate trade or commerce, even though the actual exhibitions were to take place in different states;" and even as thus construed, he expressed "doubt" as to "the presently controlling force of these precedents." (148 F.2d at 650).

As the later cases show, the views of Judge Clark as to the force of the *Hart* case and the *Old Baseball* case as precedents were not shared by his fellow judges of the Court of Appeals for the Second Circuit.

The *Ring* v. *Spina* case went up to the Court of Appeals again, after trial, under the title *Ring* v. *Authors' League of America*, 186 F. 2d 637, before Judges Learned Hand, Swan and Chase. The trial court, following the reasoning of Judge Clark, had submitted to the jury the question of whether the defendants had violated the antitrust laws and whether, if so, the plaintiff had suffered any damage thereby. The jury found in the affirmative on the first question and in the negative on the second. Accordingly, the court denied damages but granted injunctive relief. On appeal, the judgment was modified to eliminate the injunctive relief, upon the ground that plaintiff was not entitled to it on the facts.

The Court of Appeals did not have to decide the antitrust issues; but because the interstate commerce issue had been decided preliminarily on the earlier appeal, and

because the jury had found that the antitrust laws had been violated. Judge Hand did deal with the issue to an extent sufficient to erase the case as a precedent on the antitrust issues. After remarking that the defendants' protestations of innocence of antitrust violations were "relevant in deciding whether we should decide issues in which the plaintiff has only the most shadowy interests", and declaring that injunctive relief should not have been granted, Judge Hand said (186 F. 2d at 643):

> "However, we hasten to add that we leave open all legal questions which such issues involve; we wish to make it entirely clear that we are not to be understood either to throw any doubt upon, or to affirm, what we said when we granted the temporary injunction; we merely decide that the necessity for such affirmance does not arise."

As we read Judge Learned Hand's words, they mean that Judge Clark's opinion in *Ring* v. *Spina* must not be understood as deciding anything, one way or the other, on the question of whether the theatrical business is within the scope of the antitrust laws.

The last of the pertinent cases in the Second Circuit, *Conley* v. *San Carlo Opera Co.*, 163 F. 2d 310, *affirming* 72 F. Supp. 825, clearly shows the view of the Court of Appeals of that Circuit as to the binding force of the *Old Baseball* case and the *Hart* case as precedents, and their applicability to the theatrical business. The case involved arbitration under a contract between Conley, a singer, and the defendant, a traveling opera company; and it turned upon the question whether, because under the contract "Conley would have been required to travel through the various states giving performances at individual opera houses as arranged by the San Carlo Company" (72 F. Supp. at 831), the contract was one involving interstate commerce.

The District Court (Judge Leibell)—relying on the *Old Baseball* case, the *Hart* case and *Neugen* v. *Associated Chautauqua Co.*, 70 F. 2d 605—held that it was not, and granted the defendant's motion to dismiss for lack of jurisdiction.

The Circuit Court of Appeals, in a *per curiam* opinion, dealt with the question of interstate commerce as follows (163 F. 2d 310; emphasis ours):

> "'We have nothing to add to Judge Leibell's discussion of the question of jurisdiction. He thought that decision was controlled by Federal Baseball Club v. National League, 259 U. S. 200, and Hart v. B. F. Keith Vaudeville Exchange, 2 Cir., 12 F. 2d 341, Certiorari denied 273 U. S. 704. We concur. This court intimated in Ring v. Spina, 2 Cir., 148 F. 2d 647, 650, that these authorities should not be applied "beyond their exact facts, *but in the case at bar it is unnecessary to do so; they are precisely in point.* Judgment affirmed.'"

If the *Old Baseball* case and the *Hart* case were precisely in point with respect to an opera company which traveled from State to State throughout the country with its actors, ballet troupes and the elaborate costumes and scenery that performances of opera require, they are no less precisely in point in the present case.

The *Toolson* case shows that the theatrical business, like the baseball business, has been allowed to develop over a long period of years upon the premise that the Sherman Act did not apply to it; and, in spite of the decisions to that effect, Congress has not seen fit to change the law so as to bring the theatre within its scope. In such a situation, as this Court ruled in the *Toolson* case, it is for Congress, and not the courts, to amend the law if evils exist for which a remedy is required.

Before the court below the Government argued

(1) that the decision in the *Toolson* case is applicable solely to baseball, and does not apply to any other business, however similar it may be to baseball and its interstate aspects;

(2) that the complaint in this action (in some unspecified particulars) contains broader allegations of interstate commerce than did the *Hart* complaint;

(3) that the various motion picture cases are controlling and establish that the allegations of interstate commerce in the complaint in this action are sufficient to bring the case within the Sherman Act; and

(4) that, because this Court in *Hart* v. *Keith Exchange* held that a trial was necessary for a decision of the interstate commerce issue, this case must also be tried upon evidence, and was not properly decided on a motion to dismiss.

The first contention amounts to an assertion that, because the baseball business happened to be involved in a case in which certain principles of law were developed, it is the only business to which such principles apply. No authority for such a proposition has been cited; and we believe that none can be found.

The second contention is easily disposed of by a comparison of Appendix A (excerpts from the *Hart* complaint) with the complaint in the present action.

The third contention—that this case is governed by the motion picture cases—is without merit, since those cases turned upon the fact that the trade involved in them was the shipment of motion picture films in interstate commerce. The distinction goes back at least as far as Judge A. N. Hand's opinion in the *Hart* case, wherein he said (Record in 12 F.2d 341, fols. 3223-24):

> "The decision of the Supreme Court in the Binderup vs. Pathe Exchange (263 U.S. 291) case is based, in my opinion, upon the fact that the subject there was

the shipment of motion pictures, and the decision of the Supreme Court in the case of Rankin Co. vs. Billposters Co. (260 U.S. 501) is likewise based upon the ground that the shipment of posters was there a primary rather than an incidental subject of the action."

The fourth contention—that this case has to be tried on evidence because the *Hart* case had to be tried on evidence—is plainly without substance. The sufficiency of allegations of interstate commerce was tried out in the various baseball cases [3] on motions identical to the one made below; and there is no more reason for trial on evidence in the present case than there was in those cases.

Except for the temporary difficulty which this Court had in passing upon the sufficiency of the 55-page complaint in the *Hart* case, the decisions involving the baseball business and the theatrical business have treated the two businesses as the same in their interstate commerce aspects. There is no valid basis for a distinction between them in respect of the interstate commerce issue. Therefore the *Old Baseball* case, by reason of the decision in the *Toolson* case, is *stare decisis* with respect to the present action.

Conclusion

The judgment of the District Court should be affirmed or, in the alternative, the appeal of the Government should be dismissed as insubstantial.

Respectfully submitted,

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[3] For example, the *Toolson* case (101 F. Supp. 93, aff'd, 200 F. 2d 198); *Kowalski* v. *Chandler*, 202 F. 2d 413; and *Corbett* v. *Chandler* (6th Circuit), not yet reported.

APPENDIX A

"XVI. . . . The proprietors own, lease or control theatres and playhouses, at which and in connection with which they employ numerous persons, such as stage hands, property men, carpenters, electricians, ushers, ticket sellers, stage managers, conductors and musicians; they purchase and cause to be manufactured and shipped to them at such theatres and playhouses large quantities of valuable scenery, furniture, fixtures and costumes, some of which is purchased in a State other than that in which such theatre or playhouse is located, and shipped from such State to the State where such theatre or playhouse is located; these proprietors also purchase and cause to be manufactured for and shipped to them great quantities of advertising matters, such as bill posters and hand bills, much of which they cause and procure to be transported in interstate and foreign commerce; they also cause and procure to be printed, and thereafter offer the same for sale, and do sell, tickets of admission to the entertainments which they are engaged in producing, and for which tickets they receive large sums of money.

". . .

"Such acts are generally booked in New York, and the contracts contemplate and result in the transportation of the acts, which, of course, include the performers, scenery, music, costumes, and whatever constitutes the act, from State to State, and from, to, through and among the various States and Territories of the United States of America, and of the District of Columbia, and the said business has grown to such proportions, that there is a constant stream of commerce in and among the States and from State to State, and through the various Territories of the United States, in said business.

"The transportation of these acts is not only an essential element of the contracts, but is one of the greatest importance involving in many cases, the use of large quantities of accessories, and special transportation equipment and facilities.

"XIX. . . . Plaintiff's business as such manager and personal representative, among other things, has consisted and does consist in contracting with such performers to negotiate for them with the proprietors of theatres and playhouses for the employment of such performers by said proprietors; to arrange a series of employments in various countries and cities; to arrange an itinerary of performances for such performers so as to keep them continuously employed, and to reduce the amount and expense of their traveling to a minimum; to furnish such performers with information as to the most available and satisfactory routes of travel, the most satisfactory hotels at which to stop, the customs and manners of the various countries which they are to visit, and where they are to travel from one country to another; to arrange for such performers the necessary papers to be used in their dealings with the customs, immigration and other Government officials. Many of the performers who have employed plaintiff's services are actors, performers, jugglers, conjurers, acrobats and various other kinds of entertainers, operating either alone or what is known as acts or troupes acting together, who as a part of their performances have to and do avail themselves of the use of large quantities of scenery, costumes, fixtures and apparatus, animals, birds and reptiles, which belong to them and which they carry with them from place to place and from state to state in the United States of America; in such cases where plaintiff has been employed as manager or personal representative, he in many instances as a part of his employment has attended to the transportation and shipment of such scenery, costumes, fixtures, apparatus, animals, birds and reptiles, and in many cases this is and has been a very large part of plaintiff's business aforesaid. Most, if not all, of the performers engaged in vaudeville have advertising matter, consisting of bill posters and photographs, which are distributed, posted and circulated in the cities where such performers are to appear, and as a part of plaintiff's business as manager and personal representative for such performers he has attended and does attend to the procuring of such advertising matter and to the preparation of the same, and to its shipment from one

country to another and from one state to another state in the United States, and to its publication and distribution in advance of the appearance of such performers, and produces and assists in the production and staging of acts; . . .

"XXIV. Defendants E. F. Albee, Proctor, Meyerfeld, Jr., Beck and J. J. Murdock, and other of the defendants herein, either together and or alone, as hereinbefore stated, own or control and operate a large number of theatres throughout the United States; . . . said defendants also, in connection with and as a part of the said business, employ agents, who are located in the City of New York, who act for them in employing persons to perform in vaudeville for them in their aforesaid theatres, and through such agents said defendants from time to time enter into contracts with performers such as actors, acrobats, athletes, conjurers, jugglers, singers, musicians and various other entertainers, wherein and whereby said performers agree to travel from one city in one state to another city in another state of the United States and to perform in vaudeville for said defendants at their theatre in the latter place, and as a result of such contracts performers do travel and have traveled from one state to another state of the United States and have performed and do perform in vaudeville for said defendants at their aforesaid theatres, and such performers have been and are paid for such services by said defendants, and as a part of their aforesaid business said defendants have entered into and do enter into contracts with performers wherein and whereby such performers have agreed and do agree to come to the United States from a foreign country, and upon arriving in the United States to perform in vaudeville for said defendants at their aforesaid theatres, and wherein and whereby said defendants have agreed and do agree to pay said performers for such services, and as a result of such contracts said performers have and do come to the United States from foreign countries, to wit, Europe, Asia and other countries, and have performed and do perform in vaudeville for said defendants at their aforesaid theatres, and have been and are paid therefor by said defendants. And, in many instances, said performers have brought, and do bring with

them, from such foreign countries to the United States, large quantities of paraphernalia such as scenery, costumes and fixtures, animals, birds and reptiles, which they have transported and caused to be transported to the United States, and from one city in one state to another city in another state of the United States in connection with and as a part of their work in performing for said defendants in vaudeville at their aforesaid theatres as aforesaid; wherefore plaintiff claims defendants to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the Act of Congress approved July 2, 1890, and entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies'.

"XXV . . . in connection with and as a part of their aforesaid domination, management and control of said theatres they [defendants] have caused and procured, at all times herein mentioned, their agents, servants and employees in the City and State of New York to enter into and conduct negotiations with performers looking to the employment of such performers to appear and perform for them in vaudeville at such theatres; and as a result of such negotiations, said agents, servants and employees have caused and procured contracts to be entered into and do cause and procure such performers to travel from said City of New York to said theatres in states other than the State of New York, and to perform in vaudeville for said defendants and their aforesaid corporations, and said defendants have caused and procured and do cause and procure said performers to be paid therefor; and so plaintiff claims defendants to have been and to be engaged in business, trade and commerce, among the several states of the United States, within the meaning of the aforesaid Act of Congress.

"XXVI. On information and belief, that the defendants E. F. Albee, Proctor, Meyerfeld, Jr., and Beck, in connection with and as a part of the business of producing vaudeville at the theatres dominated, managed and controlled by them, as stated in the last preceding paragraph, have at all times herein mentioned caused and procured their agents, serv-

ants and employees located in the City and Southern District of New York to enter into and conduct negotiations with vaudeville performers located in Europe, looking to and resulting in said vaudeville performers coming to the United States of America to perform for hire in vaudeville performances at said theatres; and in such instances, and there have been many such, that being a regular part of said defendants' business, said performers have so come to the United States as a result and because of written agreements between them and said defendants' agents, servants and employees aforesaid; and in many such cases said performers, in compliance with and as a part of their aforesaid agreements, have brought with them and caused and procured to be transported from Europe to the United States, large quantities of scenery, fixtures, costumes, animals, birds and reptiles and other paraphernalia; and for their coming to the United States, and bringing and causing to be brought such paraphernalia as aforesaid, and for performing in vaudeville at such theatres, said defendants have at all times herein mentioned caused and procured said vaudeville performers to be paid; and so plaintiff claims defendants to be, and at all times herein mentioned to have been, engaged in business, trade and commerce with foreign nations within the meaning of the aforesaid Act of Congress.

"XXIX. . . . And in conducting the aforesaid negotiations looking to and resulting in the employment of said performers as aforesaid, and as a part of its business, said defendant has caused and procured said performers to agree to travel from one state to another state in the United States and to perform in vaudeville in such latter state; and as a result of such agreements said performers have traveled and do travel from one state to another state in the United States; and in such negotiations, and as a part of its said business said defendant has caused and procured performers to agree to travel from a foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements said performers have traveled from foreign countries, to wit, Germany, France, England, Australia and other countries to the

United States and have, after such travel, performed in vaudeville in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from the United States to and to perform in vaudeville in the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States, and after such travel have performed in vaudeville in the Dominion of Canada, and so plaintiff claims defendant to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the aforesaid Act of Congress; . . .

"XXX. . . . and as a part of its business, said defendant has caused and procured said performers to agree to travel from one state to another state in the United States and to perform in vaudeville in such latter state; and as a result of such agreement said performers have traveled and do travel from one state to another state in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from a foreign country to the United States and to perform in vaudeville in the United States, and as a result of such agreements said performers have traveled from foreign countries, to wit, Germany, France, England, Australia and other countries to the United States, and have, after such travel, performed in vaudeville in the United States; and in such negotiations, and as a part of its said business, said defendant has caused and procured performers to agree to travel from the United States to, and to perform in vaudeville in, the Dominion of Canada, and as a result of such agreements said performers have traveled from the United States to, and after such travel have performed in vaudeville in, the Dominion of Canada; and so plaintiff claims defendant to have been and to be engaged in trade and commerce among the several states of the United States and with foreign nations within the meaning of the aforesaid Act of Congress; . . ."